Supreme Court, U.S.
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No. 96-

IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

SHERRYL S. GOFFER,
Petitioner,

v.

TOGO D. WEST, JR., SECRETARY OF THE ARMY,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

PETITION FOR A WRIT OF CERTIORARI

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43 p

QUESTION PRESENTED

Did the court of appeals err in holding that the three-page "Memorandum and Order" issued by the trial court -- that necessarily contained the court's findings of fact and conclusions of law thereon as required by FED. R. CIV. P. 52 -- also satisfied FED. R. CIV. P. 58, which requires that "[e]very judgment shall be set forth on a separate document" and which this Court has repeatedly instructed "must be mechanically applied in order to avoid . . . uncertainties as to the date on which a judgment is entered?" *United States v. Indrelunas*, 411 U.S. 216, 222 (1973); *see also Bankers Trust Co. v. Mallis*, 435 U.S. 381, 386 (1978).

PARTIES

The parties in the proceedings below were:

Sherryl S. Goffer,

> Plaintiff in the District Court, Plaintiff-Appellant in the Court of Appeals

Togo D. West, Jr., Secretary of the U.S. Army,

> Defendant in the District Court, Defendant-Appellee in the Court of Appeals

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, Sherryl S. Goffer, respectfully prays that a writ of certiorari issue to review the judgment of the Court of Appeals for the District of Columbia Circuit entered in this proceeding on June 24, 1996.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the District of Columbia Circuit is unreported and is set out at pages 1a-2a of the Appendix hereto ("App."). The Memorandum and Order of the United States District Court for the District of Columbia disposing of petitioner's claims is unreported and is set out at App. 5a-6a. The Decision

and Order of the United States District Court for the District of Columbia denying petitioner's motion for a preliminary injunction is unreported and is set out at App. 7a-11a. The Order of the United States District Court for the District of Columbia denying petitioner's motion for entry of judgment is unreported and is set out at App. 3a-4a. The opinion of the United States Court of Appeals for the District of Columbia Circuit denying petitioner's earlier motion for a writ of mandamus to the district court is unreported and is set out at App. 12a.

JURISDICTION

The judgment of the Court of Appeals for the District of Columbia Circuit was entered on June 24, 1996. Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

LEGAL PROVISION INVOLVED

This case involves FED. R. CIV. P. 58,[1] which provides, in pertinent part:

> Every judgment shall be set forth on a separate document. A judgment is effective only when so set forth and when entered as provided in Rule 79(a).

STATEMENT OF THE CASE

This case is an employment discrimination suit brought against the Secretary of the Army by a civilian army employee terminated in her fifteenth year of service

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[1]The complete text of FED. R. CIV. P. 58 is set out at App. 13a.

following a history of "exceptional" employment evaluations and promotions. Plaintiff-petitioner, Sherryl Goffer, alleged violations of Title VII of the 1964 Civil Rights Act, 42 U.S.C. § 2000e-16 and § 2000e-3a, and the Civil Service Reform Act ("CSRA"), 5 U.S.C. § 1101 *et seq*. Jurisdiction over this case in the district court was conferred by 28 U.S.C. §§ 1331 and 1343. *See* 5 U.S.C. § 7702(e)(1).

This case has been marred by a series of troubling procedural irregularities in the district court that culminated in petitioner's being wrongly denied her right to appeal after having waited approximately *five years* after the trial for the district court to render a decision.

A. Delay By the District Court

This petition brings before this Court a case that at one time ranked as the oldest pending case undecided after a bench trial in the United States District Court for the District of Columbia. The complaint was filed in that court on September 5, 1985. Dispositive cross-motions on the CSRA claims were submitted in August of 1987. A bench trial before Judge Thomas Penfield Jackson proceeded between September 8 and December 17, 1987. Upon completion of the trial, the district court expressed its desire to hear closing arguments from the parties, which it indicated would be scheduled at a later date. On March 29, 1988, both parties submitted proposed findings of fact and conclusions of law on the Title VII claims. Thereafter, nothing happened.

Counsel for petitioner were puzzled both by the long delay and by the fact that the district court still had not scheduled closing arguments as it had stated it intended to do. In an effort to expedite resolution of the case, petitioner's counsel took the following steps:

(1) Counsel made repeated periodic telephone inquiries to the district court to check on the status of the case.

(2) On May 17, 1990, petitioner's counsel filed a motion requesting a status conference to discuss resolution of the case. The court held such a conference on July 18, 1990, at which time it reiterated its desire to hear closing arguments before rendering a decision and stated that the court would schedule such arguments.[2] However, no action or decision was forthcoming from the district court.

(3) On April 18, 1991, petitioner filed with the district court a Request for a Decision in the case. Despite subsequent telephone inquiries, no response came from the district court.

(4) On February 8, 1993 -- approximately five years after the close of trial and nearly two years after petitioner's Request for a Decision -- petitioner reluctantly sought appellate intervention. Petitioner filed a mandamus petition in the court of appeals, asking the higher court to direct the district court to render a decision within thirty days. On April 8, 1993, the court of appeals denied the mandamus petition, but encouraged the district court "to attend to the resolution of this case as promptly as feasible." App. 12a.

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[2]The docket confirms that on July 18, 1990, the court indicated that it would schedule closing arguments.

B. Procedural Irregularities Attendant to the District Court's Issuance of the Order Disposing of this Case

Unbeknownst to petitioner and the court of appeals, prior to that court's April 8, 1993 order encouraging the district court to act "promptly," on February 23, 1993, the district court apparently had issued a three-page "Memorandum and Order" (App. 5a-6a) in which the court purported to assess the evidence presented in the case, made certain findings of fact and conclusions of law based on that evidence, and recited that judgment was entered for the defendant. In the order, the district court stated that it was incorporating by reference the findings and conclusions that it had set forth in an earlier order issued November 20, 1985, in which it had denied a motion by petitioner for a preliminary injunction (App. 7a-11a). The order was surprisingly conclusory, resolving in just over two pages the numerous questions of fact and law presented in a five-day bench trial and the many complex issues raised in cross-motions for summary judgment on the CSRA claim.[3]

Even more surprising, however, is the fact that the district court did not notify the court of appeals of its decision, although the petition for a writ of mandamus was still pending in that court. Nor did the district court notify the court of appeals after receipt of the April 8, 1993 order encouraging "prompt[]" action. Such a notification also would have informed petitioner that the district court

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[3]Illustrating the detailed nature of the factual and legal inquiries were the parties' proposed findings of fact and conclusions of law on the Title VII claims that jointly exceeded 100 pages. Although the court's order incorporated by reference its findings and conclusions from the 1985 preliminary injunction order, that earlier order, of course, did not consider the substantial evidence uncovered during discovery that was presented during the five-day bench trial.

believed that her time to file a notice of appeal had begun to run. Knowledge of the district court's February 23 ruling, even at that April date, would have permitted petitioner to safeguard her appellate rights. At that date, petitioner could still have filed a precautionary notice of appeal, for even if the February 23 order had constituted a valid entry of judgment -- which it did not -- under FED. R. APP. P. 4(a) petitioner would have had until April 24, 1993, to file a notice of appeal.

The case was subject to further peculiar treatment; in particular, the highly irregular manner in which the district court clerk entered the Memorandum and Order reflected violations of the Federal Rules of Civil Procedure and was inconsistent with elementary notions of fairness:

(1) First, *it appears that the district court never mailed copies of the order to petitioner's counsel.* As a result, it was not until more than two years later on June 5, 1995, that petitioner's counsel, in the course of obtaining a copy of the docket for the purpose of attaching it to a second mandamus petition, learned that an order had been issued purportedly disposing of the case.[4] Although FED. R. CIV. P. 77(d) requires the clerk to mail copies of all orders or judgments to the parties in the case,[5] neither of petitioner's

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[4]During the intervening period, petitioner's counsel attempted to check the status of the case by calling the clerk's office. However, counsel was informed that such inquiries could no longer be made by telephone and that parties could check the docket only by use of a certain computer program (which counsel did not have) or by a physical examination of the docket at the clerk's office.

[5] Immediately upon the entry of an order or judgment the clerk shall serve a notice of the entry by mail . . . upon each

two counsel of record ever received any notice of the court's decision. The apparent failure of the court to mail a copy of the order to petitioner's counsel is confirmed by the district court docket, which contains no notation indicating that the order had been mailed, as is required by Rule 77(d).[6]

(2) The district court also evidently failed to transmit the order to the court of appeals, for the court of appeals ruled on petitioner's then-pending mandamus petition six weeks after the district court's ruling, clearly demonstrating no knowledge that the district court had already ruled. Nor did the government take any steps to bring to the attention of the court of appeals (either before

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party . . . , and shall make a note in the docket of the mailing.

FED. R. CIV. P. 77(d).

[6]In opposing petitioner's motion for entry of judgment, respondent asserted that the U.S. Attorney's Office had received a copy of the February 23 Memorandum and Order within a week of its issuance, and that the document bore a handwritten "(N)" at the bottom corner of the first page, which indicated that the clerk had sent notice of its entry to the parties. In denying petitioner's motion for entry of a judgment in conformity with FED. R. CIV. P. 58, the district court stated, apparently based upon the same notation, that "the February 23, 1993 judgment indicates that notice of entry of judgment was sent to the parties counsel" (App. 3a). However, the *docket* contains no indication that notice of entry of the February 23 order was sent to the parties, as Rule 77(d) requires, *see supra* note 5. Indeed, other than orders actually transcribed by a court reporter during court proceedings, the docket entry for every other order in the case except this one bears a typewritten "(N)," confirming such mailing in accordance with the Rule. (A copy of the docket has been lodged with the Clerk of this Court.)

or after it issued its decision) the district court ruling which had, in effect, rendered the mandamus petition moot.

(3) Finally, and most importantly for the purposes of this petition, the district court failed to comply with Rule 58's strict requirement that every court opinion disposing of a case be accompanied by a separate document setting forth the judgment in the case. The "Memorandum and Order" included a cursory discussion of the facts and the applicable law, concluding with a single sentence purporting to enter judgment for defendant (App. 5a-6a). However, the order was not accompanied by a separate document setting forth the judgment as required by Rule 58.

C. The Motion for Entry of Judgment

As noted above, on June 5, 1995, petitioner's counsel, in the course of preparing to file a second mandamus petition, obtained an updated copy of the docket and learned for the first time of the district court's February 23, 1993 Memorandum and Order. Upon obtaining a copy of that Memorandum and Order from the clerk's office, counsel learned that the district court had failed to comply with Rule 58's separate judgment requirement. Petitioner immediately filed on June 6, 1995, a motion requesting the district court to remedy that error by entering a separate judgment as required by Rule 58. The district court denied that motion on July 24, 1995 (App. 3a-4a), and petitioner appealed that ruling to the court of appeals.

D. The Ruling Below

The court of appeals affirmed the district court's denial of the motion for entry of a separate judgment in a cursory opinion holding that the district court's Memorandum and Order entered two years earlier had

satisfied the requirements of Rule 58, and that a separate judgment document was therefore not needed (App. 1a). This petition for writ of certiorari followed.

REASONS FOR GRANTING THE WRIT

I

THE DECISION BELOW FLATLY CONTRADICTS THIS COURT'S DECISIONS IN *UNITED STATES V. INDRELUNAS* AND *BANKERS TRUST CO. V. MALLIS*

Since the amendment of FED. R. CIV. P. 58 in 1963 to include the separate judgment rule, this Court has repeatedly stressed the importance of the requirement. Although the Court has recognized one narrowly circumscribed exception to the rule, that exception clearly does not apply here. The decision below conflicts with the unequivocal teaching of this Court and should be corrected through a grant of certiorari. *See* SUP. CT. R. 10(c).

In *United States v. Indrelunas*, 411 U.S. 216 (1973), this Court explained the purpose and meaning of the Rule 58 separate document requirement:

> Rule 58 was substantially amended in 1963 to remove uncertainties as to when a judgment is entered . . . .
>
> The reason for the "separate document" provision is clear from the notes of the advisory committee of the 1963 amendment. *See* Notes of Advisory Committee following FED. RULE CIV. P. 58, reported in 28 U.S.C. Prior to 1963, there was considerable uncertainty over what

actions of the District Court would constitute an entry of judgment, and occasional grief to litigants as a result of this uncertainty. *See, e.g., United States v. F. & M. Schaefer Brewing Co.*, 356 U.S. 227 (1958). To eliminate these uncertainties, which spawned protracted litigation over a technical procedural matter, Rule 58 was amended to require that a judgment was to be effective only when set forth on a separate document.

Professor Moore makes the following cogent observation with respect to the purpose of the separate-document provision of the rule:

> "This represents a mechanical change that would be subject to criticism for its formalism were it not for the fact that something like this was needed to make certain when a judgment becomes effective, which has a most important bearing, *inter alia*, on the time for appeal and the making of post-judgment motions that go to the finality of the judgment for purposes of appeal." 6A J. MOORE, FEDERAL PRACTICE ¶ 58.04 [4.-2], at 58-161 (1972).

Indrelunas, 411 U.S. at 119-21. In light of this purpose, this Court concluded that "[Rule 58] *must be mechanically applied* in order to avoid new uncertainties as to the date on which a judgment is entered." 411 U.S. at 222 (emphasis added).

Five years later in *Bankers Trust Co. v. Mallis*, 435 U.S. 381 (1978), this Court clarified further the meaning and application of Rule 58. Cases had arisen repeatedly in which the parties had regarded as final -- and attempted to appeal from -- a district court ruling that, while disposing of all claims, did not set forth the judgment in a separate document as required by Rule 58. In such cases, strict enforcement of Rule 58 would be wasteful as it would require dismissal of what often was a fully-briefed appeal, only for the district court to go through the formality of entering a separate judgment, at which point the appellate process would begin anew. In *Mallis*, the Court, while stressing the critical importance of the separate judgment rule, sensibly held that in certain very limited circumstances the requirement might be waived. Where both parties are prepared to go forward with an appeal, notwithstanding the lack of a separate judgment, and where no party would be prejudiced, "parties to an appeal may waive the separate judgment requirement of Rule 58." *Mallis*, 435 U.S. at 387. The Court explained:

> The separate-document requirement was thus intended to avoid the inequities that were inherent when a party appealed from a document or docket entry that appeared to be a final judgment of the district court only to have the appellate court announce later that an earlier document or entry had been the judgment and dismiss the appeal as untimely. The 1963 amendment to Rule 58 made clear that a party need not file a notice of appeal until a separate judgment has been filed and entered. *See United States v. Indrelunas*, 411 U.S. 216, 220-222 (1973). Certainty as to timeliness, however, is not advanced by holding that appellate jurisdiction does not

> exist absent a separate judgment. If, by error, a separate judgment is not filed before a party appeals, nothing but delay would flow from requiring the court of appeals to dismiss the appeal. Upon dismissal, the district court would simply file and enter the separate judgment, from which a timely appeal would then be taken. Wheels would spin for no practical purpose.

Mallis, 435 U.S. at 385. The Court continued:

> The need for certainty as to the timeliness of an appeal, however, should not prevent the parties from waiving the separate-judgment requirement where one has accidentally not been entered. As Professor Moore notes, if the only obstacle to appellate review is the failure of the District Court to set forth its judgment on a separate document, "there would appear to be no point in obliging the appellant to undergo the formality of obtaining a formal judgment." 9 J. MOORE, FEDERAL PRACTICE ¶ 110.08 [2], p. 120 n. 7 (1970). "[I]t must be remembered that the rule is designed to simplify and make certain the matter of appealability. It is not designed as a trap for the inexperienced."

Mallis, 435 U.S. at 386. However, still quoting Professor Moore, the Court concluded this discussion with the significant warning that "[Rule 58] *should be interpreted to prevent loss of the right of appeal, not to facilitate loss*." *Id.* (quoting 9 J. MOORE, FEDERAL PRACTICE ¶ 110.08[2], p.120 n.7 (1970)) (emphasis added).

In holding that the district court's order satisfied Rule 58 in this case even though the judgment was not set forth in a separate document, the court below has created a new exception to Rule 58 that negates its purpose. The court of appeals' summary ruling, which contains no analysis whatsoever, justifies its holding with a bare citation to *Spann v. Colonial Village, Inc.*, 899 F.2d 24, 32 (D.C. Cir.), *cert. denied*, 498 U.S. 980 (1990). However, *Spann* arose in a very different posture from this case and in no way supports the instant ruling. *Spann* was a routine application of the waiver rule outlined by this Court in *Mallis*: it involved a timely-filed and fully briefed appeal in a case where no separate judgment had been entered. *Spann* was thus a case where waiving the Rule 58 requirement would avoid an unnecessary remand and would not result in either party losing its right to appeal. *See Spann*, 899 F.2d at 32 (following *Mallis*).

Unlike *Spann*, this case does not fall into the category of cases where the strict Rule 58 requirement may be waived under *Mallis*. Here, if Rule 58 is not "mechanically applied," *Mallis*, 435 U.S. at 386, petitioner will lose her right to appeal after unfairly being forced to wait for years to have her case decided. This result would be particularly unfair in view of the fact that petitioner was not able take the precautionary step of filing a provisional notice of appeal from the defective 1993 Memorandum and Order, since her counsel never received it.

The court of appeals' unexplained new exception to Rule 58 not only construes the rule so as unfairly to deny petitioner her right of appeal but, if permitted to stand, will pose a grave risk to the appellate rights of all litigants by destroying the predictability established by Rule 58. Safeguarding litigants' appellate rights depends on the existence of and adherence to universally recognized "bright-

line" standards for determining when a final judgment has been entered, thus triggering FED. R. APP. P. 4's deadlines for filing an appeal. Before 1963, confusion as to when a judgment was final had caused litigants unfairly to lose their rights of appeal. Responding to this serious problem, the drafters of the 1963 amendments to Rule 58 settled on the "mechanical" separate judgment requirement as a solution. Tolerating the court of appeals' ad hoc creation of a new exception will gut the Rule 58 amendments, giving rise once again to the wasteful and unfair uncertainty that prevailed before 1963. This would be particularly egregious in this case where petitioner had to mount a five-year effort to get the district court to decide her case.

In light of this Court's stern injunction that "[Rule 58] should be interpreted to prevent loss of the right of appeal, *not to facilitate loss*," *Mallis*, 435 U.S. at 386 (quoting 9 J. MOORE, FEDERAL PRACTICE ¶ 110.08[2], p.120 n.7 (1970)) (emphasis added), the court of appeals' dangerously misguided doctrinal innovation stands in contravention of binding precedent of this Court and, under SUP. CT. R. 10(c), should be corrected through exercise of the certiorari power.

II

THE DECISION BELOW CONFLICTS WITH DECISIONS OF THE SECOND, THIRD, FOURTH, NINTH, AND TENTH CIRCUIT COURTS OF APPEALS

Not only is the ruling of the Court of Appeals for the District of Columbia Circuit in this case unfaithful to this Court's teaching in *Indrelunas* and *Mallis*, but the decision conflicts with rulings of at least five other federal courts of appeals. *See* SUP. CT. R. 10(a). The Courts of Appeals for the Second, Third, Fourth, Ninth, and Tenth Circuits have

all held that an order that disposes of a case and that contains a discussion of the legal analysis supporting the ruling cannot satisfy the separate judgment requirement of Rule 58. *See Cooper v. Town of East Hampton*, 83 F.3d 31, 34 (2d Cir. 1996) (order containing discussion of reasons for decision directing entry of judgment cannot satisfy separate judgment requirement); *Gregson & Assoc. v. Virgin Islands*, 675 F.2d 589, 591-93 & n.1 (3d Cir. 1982) (document containing legal analysis and setting out judgment on final page does not satisfy separate document requirement); *Barber v. Whirlpool Corp.*, 34 F.3d 1268, 1274-75 (4th Cir. 1994) (order containing findings of fact and conclusions of law with last page containing order of dismissal cannot satisfy separate judgment requirement); *Allah v. Superior Court of Calif.*, 871 F.2d 887, 890 (9th Cir. 1989) (opinions containing legal analysis cannot satisfy separate judgment requirement); *Vernon v. Heckler*, 811 F.2d 1274, 1276 (9th Cir. 1987) (same); *Paddock v. Morris*, 783 F.2d 844, 846 (9th Cir. 1986) (same); *Clough v. Rush*, 959 F.2d 182, 185 (10th Cir. 1992) (orders can contain "neither a discussion of the court's reasoning nor any dispositive legal analysis" if they are to qualify as separate judgments). Indeed, the Court of Appeals for the Second Circuit has gone even further and imposed the additional requirement that a document that is not clearly labeled as a "Judgment" can never satisfy the separate judgment requirement of Rule 58. *See Cooper v. Town of East Hampton*, 83 F.3d 31, 34 (2d Cir. 1996); *Axel Johnson, Inc. v. Arthur Anderson & Co.*, 6 F.3d 78, 84 (2d Cir. 1993); *Kanematsu-Gosho, Ltd. v. M/T Messiniaki Aigli*, 805 F.2d 47, 49 (2d Cir. 1986).

This case law from other circuits conflicts importantly with the ruling of the Court of Appeals for the District of Columbia Circuit in this case. Here, the district court's opinion, while surprisingly conclusory given the very significant amount of evidence presented at trial, nonetheless

set forth findings of fact and conclusions of law supporting the court's ruling for defendant on all claims. *See* App. 5a-6a. As the district court explicitly recognized, this document necessarily constituted the court's findings of fact and conclusions of law, as required by FED. R. CIV. P. 52(a) following a bench trial. *See* App. 5a. In deeming that such a document also constitutes the separate judgment required by Rule 58, the court below has both created a significant split with the legal standard prevailing in the five other circuits noted above, and has also created new confusion regarding the critical issue of when a ruling constitutes a separate -- and hence final -- judgment.

These other circuits have frequently faced circumstances such as this, where a district court has issued an order purporting to combine both legal analysis and a judgment in the same document, and where the losing party did not take the extra precautionary step of filing a notice of appeal from that defective order. In such cases, because failure to enforce the separate judgment requirement would result in the appeal being time-barred, the courts have uniformly refused to waive the separate judgment requirement, thus preserving the opportunity for appeal. *See Gregson & Assoc.*, 675 F.2d at 591-93 (3d Cir.) (Rule 58 not waived so as to preserve opportunity to appeal); *Allah*, 871 F.2d at 890 (9th Cir.) (same); *Paddock*, 783 F.2d at 846 (9th Cir.) (same); *Clough*, 959 F.2d at 185 (10th Cir.) (same).

The law and practice of these circuits stands in direct conflict with the holding of the District of Columbia Circuit in this case,[7] thus making certiorari review appropriate.

III

IN PERMITTING THE DISTRICT COURT'S SERIOUS PROCEDURAL ERRORS TO DENY PETITIONER HER RIGHT TO APPELLATE REVIEW, THE DECISION BELOW SO DEPARTS FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS AS TO CALL FOR EXERCISE OF THIS COURT'S SUPERVISORY POWERS

A serious error occurred in this case when neither of petitioner's counsel of record were notified of the district court's Memorandum and Order disposing of the case, after petitioner had been forced to wait approximately five years for a ruling. This error could easily have resulted in petitioner losing her right to appeal, for Rule 77(d) establishes the harsh rule that "[l]ack of notice of the entry [of an order or judgment] by the clerk does not affect the time to appeal" as specified under FED. R. APP. P. 4(a). As petitioner did not learn of the order until two years after it was entered, the deadline for appealing -- here, sixty days

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[7]While the decision by the court of appeals in this matter was entered summarily and withheld from publication, this does not lessen the conflict between the rule applied by the court below and that applied in similar circumstances by the courts of appeals of five other circuits; Rule 58 contains no exception for unreported decisions. *See, e.g., Hensley v. Eckerhart*, 461 U.S. 424, 428, 432 & n.5 (1983) (Court granted certiorari from unreported summary affirmance "to clarify the proper relationship of the results obtained to an award of attorney's fees" under 42 U.S.C. § 1988, noting "varying standards" applied by the courts of appeals to the question).

under FED. R. APP. P. 4(a) -- would have long since run had the district court's 1993 order otherwise been in conformity with the applicable rules.[8] However -- and fortunately for petitioner -- the deadline for pursuing an appeal did not begin to run because the district court, erroneously, failed to enter a separate judgment as required by Rule 58.

That additional error should have meant that the grave injustice to petitioner -- losing her right to appeal -- would be avoided. Under Rule 58, the time for filing the notice of appeal does not begin to run until the required separate judgment is entered. *Shalala v. Schaefer*, 509 U.S. 292, 302-03 (1993). However, the district court and the court of appeals denied petitioner's right to appellate review by carving out a new exception to the Rule 58 separate judgment rule, one that negates the very purpose of the rule. As a result of this unprecedented exception -- for which the cursory lower court opinions offer no coherent justification (App. 1a; App. 3a) -- the courts below held that judgment in

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[8]Petitioner never had the opportunity to file a precautionary notice of appeal. When the district court issued its Memorandum and Order, petitioner had a petition for a writ of mandamus pending in the court of appeals, requesting that court to direct the district court to decide the case. The court of appeals decided the pending matter nearly two months *after* the district court disposed of the case. In its order, the court of appeals refused to direct the district court to act, but encouraged that court to decide the case promptly. Since neither petitioner nor the court of appeals was aware of the district court's Memorandum and Order, there was no reason to expect that the district court's response to the court of appeals' ruling had already occurred. Petitioner therefore had no reason to review the docket to determine whether the district court had taken any action that predated the court of appeals ruling. Nor did the continued delay put petitioner on notice, since the district court already had delayed acting in the case for five years.

the case was validly entered back when the district court issued its 1993 order,[9] and any appeal by petitioner was accordingly time-barred.

As explained above, this new exception conflicts with the clear and repeated teaching of this Court, and creates a

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[9]The court of appeals, in its very short decision, termed "troubling" the fact that petitioner's counsel did not learn of the district court's 1993 ruling until 1995 (App. 1a). The court criticized counsel for not having visited the courthouse and examined the district court docket during the period between 1993 and 1995. (It was on such a trip in 1995 that petitioner's counsel learned of the 1993 order.) This criticism is unfair for several reasons. First, because the district court had told counsel explicitly in 1990 that it still intended to schedule closing arguments, counsel reasonably believed that no dispositive order would be entered until after such arguments. Second, during the first several years after the close of trial, while petitioner was awaiting action by the court, her counsel did, in an abundance of caution, regularly check for activity in the case by telephoning the district court clerk's office. However, as previously noted, the clerk's office later stopped allowing telephone inquiries, requiring instead that litigants either physically inspect the docket at the courthouse, or else use a computer program that counsel did not have, in order to monitor case activity. Finally, as noted, at the time the district court purported to enter judgment, petitioner had a petition pending in the court of appeals asking that court to order the district court to act. The court of appeals did not dispose of that petition until almost two months *after* the district court's Memorandum and Order was issued. Petitioner respectfully suggests that in a case where the district court had still not ruled five years after the close of trial -- and where the court had indicated that it would not rule until closing arguments had been held -- it is unreasonable to expect that counsel should have visited the courthouse daily or weekly as a precaution against the off chance that the court might unexpectedly rule -- and then fail to mail copies of the order to *both* lawyers who had appeared on petitioner's behalf, or to the court of appeals where a petition for a writ of mandamus was pending.

conflict with the law of at least five circuits. If left uncorrected, it will operate in this case to deny petitioner her basic and important right to appellate review -- after she waited more than five years for a ruling. Such wholesale denial of a litigant's right to appeal defies basic notions of fair play and seriously undermines litigants' confidence in the federal courts.[10] As such, the decision below so departs from the accepted and usual course of judicial proceedings as to call for review on certiorari in the exercise of this Court's supervisory powers, as authorized by SUP. CT. R. 10(a).

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[10]The extreme delay and inattention in processing this case likely contributed to its irregular treatment, resulting in the unusual denial of a party's cherished right of appeal. Injury of this type, unless corrected, should be added to the list of problems caused by delays in the federal judiciary, which Congress recently sought to remedy in the Judicial Improvements Act of 1990, 28 U.S.C. §§ 471-82. Congress found cost and delay in the administration of justice posed serious problems, *id.* § 471, note, and concluded that high costs and long delays had left the "time honored promise" of "just, speedy, and inexpensive resolution of civil disputes" out of reach of many citizens. S. Rep. No. 416, 101st Cong., 2d Sess. 1 (1990), *reprinted in* 1990 U.S.C.C.A.N. 6802, 6804.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted and the decision of the court below reversed.

Respectfully submitted,

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APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT
No. 95-5259
Filed June 24, 1996

Sherryl S. Goffer,
Appellant

v.

Togo D. West, Jr., Secretary of the Army,
Appellee

BEFORE: Wald, Williams, and Tatel, Circuit Judges

ORDER

Upon consideration of the motion for summary affirmance and the opposition thereto, and the motion for summary reversal, it is

ORDERED that the motion for summary affirmance of the order filed July 24, 1995 be granted. The district court's February 23, 1993, order complied with the requirements of FED. R. CIV. P. 58 and 79(a). *See Spann v. Colonial Village, Inc.*, 899 F.2d 24, 32 (D.C. Cir. 1990). The court notes that appellant's failure to learn of the entry of the order (through an examination of the district court docket) until June 1995 is troubling. The merits of the parties' positions are so clear as to warrant summary action. *See Taxpayers Watchdog, Inc. v. Stanley*, 819 F.2d 294, 297 (D.C. Cir. 1987) (per curiam); *Walker v. Washington*, 627 F.2d 541, 545 (D.C. Cir.) (per curiam), *cert. denied*, 449 U.S. 994 (1980). It is

FURTHER ORDERED that the motion for summary reversal be denied.

The Clerk is directed to withhold issuance of the mandate herein until seven days after disposition of any timely petition for rehearing. *See* D.C. Cir. Rule 41.

Per Curiam

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA
Filed July 24, 1995

SHERRYL S. GOFFER,
Plaintiff,
v. Civil Action No. 85-2827 TPJ
TOGO D. WEST, JR.,
Secretary of the Army,
Defendant.

ORDER

UPON CONSIDERATION of Plaintiff's Motion for Entry of Judgment, defendant's opposition thereto, and the entire record herein, and

UPON FURTHER CONSIDERATION that, contrary to plaintiff's assertion, the court's February 23, 1993, Memorandum and Order was entered on the Court's docket consistent with FED. R. CIV. P. 79(a), and

UPON FURTHER CONSIDERATION that, contrary to plaintiff's assertion, the Court's February 23, 1993, Memorandum and Order complies with the separate-document requirement of FED. R. CIV. P. 58, and

UPON FURTHER CONSIDERATION that the February 23, 1993, judgment indicates that notice of entry of judgment was sent to the parties counsel consistent with FED. R. CIV. P. 77(d), and that even if plaintiff's counsel did not receive a copy, Rule 77(d) explicitly states that "[l]ack of notice of the entry by the clerk does not affect the time to appeal or relieve or authorize the court to relieve a party for failure to appeal within the time allowed, . . ."

ACCORDINGLY, it is by the Court this 21st day of July, 1995, hereby

ORDERED, that plaintiff's motion for entry of judgment should be and hereby is DENIED.

s/s
UNITED STATES DISTRICT JUDGE

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA
Filed Feb. 23, 1993

SHERRYL S. GOFFER,
Plaintiff,
v. Civil Action No. 85-2827
JOHN O. MARSH, JR.,
Secretary of the Army,
Defendant.

MEMORANDUM AND ORDER

Two matters remain for resolution by the Court in this case: (1) findings and conclusions pursuant to FED. R. CIV. P. 52(a), following non-jury trial in September, 1987, upon plaintiff's Title VII claim that she was first demoted and later dismissed from federal service in the Department of the Army in retaliation for her EEO activity; and (2) a decision upon dispositive cross-motions to reverse or affirm a decision of the MSPB affirming plaintiff's demotion and dismissal in August, 1986.

The Court incorporates its findings and conclusions set forth in its Decision and Order of November 20, 1985, denying plaintiff's motion for a preliminary injunction. There the Court found that no discriminatory or retaliatory animus has been shown on the part of defendants in reassigning -- and in the process demoting -- the plaintiff as part of a major intra-departmental reorganization within the Department of the Army. Similarly, the court finds that no such animus permeated her termination from federal service.

The court credits in full the testimony of Delbert Spurlock, former general counsel of the Army, who, as a newly appointed Assistant Secretary of the Army in August,

1983, instituted the reorganization to, *inter alia*, *enhance* the Army's discharge of its EEO responsibilities, as it ultimately did, although the reorganization entailed the abolition of plaintiff's position. The Court also credits in full the testimony of Delores Symons, under whose supervision the plaintiff came after the reorganization. According to Symons, plaintiff's performance in her capacity as an EEO case analyst was markedly deficient, and did not improve despite concerted efforts made by Symons and others to that end. The Court finds that plaintiff was justifiably terminated for cause from federal service in October, 1985, and that no employment decision by any of her superiors was ever taken during her term of service on the basis of her race or sex, or in retaliation for any EEO activity she had undertaken, either on her own behalf or generally in the court of her duties.

Having so found, the Court also concludes as well that the decisions of the MSPB of March 7, 1986, and August 12, 1986, affirming plaintiff's separation from federal service are supported by substantial evidence, are not arbitrary or capricious, and are in all respects in accordance with law, *i.e.*, the Civil Service Reform Act, as upholding a legitimate exercise of managerial discretion.

For the foregoing reasons, therefore, it is this 23rd day of February, 1993,

ORDERED, that judgment is entered in favor of defendant Secretary of the Department of the Army on the amended complaint of Sherryl S. Goffer, in its entirety, and the complaint is dismissed with prejudice.

s/s
Thomas Penfield Jackson
U.S. District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA
Filed Nov. 20, 1985

SHERRYL S. GOFFER,
Plaintiff,
v. Civil Action No. 85-2827
JOHN O. MARSH, JR.
Secretary of the Army,
Defendant.

ORDER

This Title VII employment discrimination case, brought on race, sex, and reprisal grounds, is presently before the Court on plaintiff's motion for preliminary injunction, her earlier application for a TRO having been denied.[1] She asks that defendant Secretary of Army be ordered to reinstate her *pendente lite* in the Grade 15 EEO position she once held in the office of an Assistant Secretary prior to her demotion pursuant to a reorganization of the secretariat begun in October, 1983, and her subsequent termination in the fall of 1985 from government service altogether. The merits of her claim are, therefore, now at issue only insofar as they bear upon the familiar four elements of a meritorious claim for preliminary injunctive relief:

1) That without such relief, plaintiff will suffer irreparable injury, having no adequate remedy otherwise;

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[1]More precisely, defendant has moved to "deny" the motion for a preliminary injunction, on analogy to FED. R. CIV. P. 41(b), at the close of plaintiff's evidence. Defendant was permitted to call one witness, already present in court, to preserve his testimony in the event the motion to deny were denied.

2) That plaintiff appears substantially likely to prevail on the merits at trial;

3) That the equities balance in plaintiff's favor, or at lease not against her; and

4) That it is in the public interest to grant the relief requested.[2]

The Court finds from the evidence that plaintiff has satisfied, at best, only the third and fourth of the necessary elements for the relief she seeks; in other words, had she been able to establish irreparable injury and a likelihood of success on the merits, it would be neither inequitable, nor contrary to the public interest, to order a restoration of the *status quo ante* while the matter is litigated to a conclusion.

Plaintiff's evidence, however, does *not* establish that she is at any greater risk of irreparable injury now than she was at the time her application for a TRO was denied, as to which the Court found her allegations of injury insufficient as a matter of law on the authority of *Sampson v. Murray*, 415 U.S. 61 (1974). The additional items of injury she has proffered here, viz., her fear of losing custody of her

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[2]The Court concludes that the two-day evidentiary hearing on plaintiff's motion -- of which all but the final 17 minutes was devoted to the testimony of plaintiff herself and multiple "adverse" witnesses she called from the Department of the Army -- afforded plaintiff the full and fair opportunity to which she was entitled to demonstrate the "pretextual" character of the reasons proffered by the witnesses she herself called for her demotion and discharge. *See Mitchell v. Baldridge*, 759 F.2d 80, 87-88 (D.C. Cir. 1985). Plaintiff does not contend that her presentation was unduly restricted, but, rather, that the defendant's reasons must be deemed *prima facie* pretextual until they are further explained in its case-in-chief. The Court finds them to have been sufficiently explained in the course of plaintiff's case and in need of no elaboration.

daughter if unable to support her, and her apprehensions for the future of EEO enforcement generally throughout the Department of the Army if others are discouraged by her example, are both purely speculative at this stage, and neither is of a nature substantially more compelling than those the Supreme Court rejected in *Sampson v. Murray*.[3]

Insofar as the likelihood of her ultimate success on the merits is concerned, plaintiff has offered absolutely no *direct* evidence that any of the actions taken by Army officials which adversely affected her were improperly motivated by her race or sex, or that her dismissal was an act of retaliation against her either for her assertion that her demotion was so motivated, or for her earlier EEO activism. If race, sex, or activism had played any part, it would have to be inferred entirely from the circumstances alone that plaintiff is black, female, and an activist; that her termination occurred subsequent to her EEO complaint; and that the explanation of the adverse witnesses for their conduct towards her is unworthy of credence.

Whether she was treated fairly or not, however, there is no other evidence to show that those explanations were "pretextual" for unlawful discrimination or retaliation originating in considerations of race or sex, or activism, assuming they were "pretextual' at all -- which the Court expressly does *not* find -- and it is at least an equally permissible inference from this record that the Army officials were unfavorably disposed towards Ms. Goffer, because they found her to be a contentious and self-centered person, unwilling or unable to defer to authority, and more

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[3]The latter is, moreover, convincingly refuted by the testimony of defendant's only witness that the reorganization of which plaintiff complains -- and the officials she has accused of discrimination -- have significantly advanced the cause of EEO as perceived by Army EEO officials in the field.

concerned with her own status and perquisites than the efficient and harmonious operation of her office.[4]

The Court does expressly find that Mr. Spurlock's stated purposes in implementing the reorganization were not pretextual at all. They had a rational basis unconnected in any way with a desire to manipulate the EEO program other than to increase its efficiency. And as to its impact on Ms. Goffer specifically, her race and sex genuinely made his decision to go forward with it more difficult. Rather than seeking to excuse to discriminate against her, or to punish her for her past EEO activities, Mr. Spurlock actually sought ways to ameliorate its impact upon her.

The court also expressly credits the testimony of Ms. Symons and Mr. Matthews as to their subjective reasons for the actions taken by them which ultimately lead to plaintiff's termination from federal service. It makes no finding with respect to whether any of them were objectively justified, since it is unnecessary to do so, having found that the reasons given had nothing whatsoever to do with plaintiff's race, sex, or her prior administrative complaint that they were.

For the foregoing reasons, therefore, it is, this 20th day of November, 1985,

ORDERED, that plaintiff's motion for a preliminary injunction is denied; and it is

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[4]In this respect the Court contrasts her attitude toward the reorganization with that of Ms. Symons who, although also opposed to it, nevertheless acceded to it gracefully once her objections had been registered.

FURTHER ORDERED, that the proceedings thereon are made a part of the record on the trial pursuant to FED. R. CIV. P. 65(a)(2); and it is

FURTHER ORDERED, that this case is scheduled for a status conference at 9:30 a.m. on January 6, 1986, if the case still remains before this court.

s/s
Thomas Penfield Jackson
U.S. District Judge

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT
No. 93-5025
Filed April 8, 1993

In re: Sherryl S. Goffer
Petitioner,

BEFORE: Wald, Ruth B. Ginsburg and Sentelle, Circuit Judges

ORDER

Upon consideration of the petition for writ of mandamus, it is

ORDERED that the petition be denied. Mandamus is an extraordinary and drastic remedy, *Kerr v. United States District Court*, 426 U.S. 394, 402 (1967), justified only by "exceptional circumstances amounting to a judicial 'usurpation of power.'" *Gulfstream Aerospace Corp. v. Mayacamas Corp.*, 485 U.S. 271, 289 (1988) (citations omitted). The district court's delay, although prolonged, does not yet warrant the extreme measure petitioner seeks. *See Cartier v. Secretary of State*, 506 F.2d 191, 199 (D.C. Cir. 1974), *cert. denied*, 421 U.S. 947 (1975). We encourage the district court, however, to attend to the resolution of this case as promptly as feasible. Should the court fail to do so, we will entertain a renewed petition.

Per Curiam

Federal Rules of Civil Procedure
Rule 58. Entry of Judgment

Subject to the provisions of Rule 54(b): (1) upon a general verdict of a jury, or upon a decision by the court that a party shall recover only a sum certain or costs or that all relief shall be denied, the clerk, unless the court otherwise orders, shall forthwith prepare, sign, and enter the judgment without awaiting any direction by the court; (2) upon a decision by the court granting other relief, or upon a special verdict or a general verdict accompanied by answers to interrogatories, the court shall promptly approve the form of the judgment, and the clerk shall thereupon enter it. Every judgment shall be set forth on a separate document. A judgment is effective only when so set forth and when entered as provided in Rule 79(a). Entry of the judgment shall not be delayed, nor the time for appeal extended, in order to tax costs or award fees, except that, when a timely motion for attorneys' fees is made under Rule 54(d)(2), the court, before a notice of appeal has been filed and has become effective, may order that the motion have the same effect under Rule 4(a)(4) of the Federal Rules of Appellate Procedure as a timely motion under Rule 59. Attorneys shall not submit forms of judgment except upon direction of the court, and these directions shall not be given as a matter of course. (As amended Dec. 27, 1946, eff. Mar. 19, 1948; Jan. 21, 1963, eff. July 1, 1963; Apr. 22, 1993; eff. Dec. 1, 1993.)

No. 96-461

In the Supreme Court of the United States

OCTOBER TERM, 1996

SHERRYL S. GOFFER, PETITIONER

v.

TOGO D. WEST, JR., SECRETARY OF THE ARMY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT

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QUESTION PRESENTED

Whether the district court's February 23, 1993, Memorandum and Order constituted an effective judgment within the meaning of Fed. R. Civ. P. 58.

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In the Supreme Court of the United States

OCTOBER TERM, 1996

No. 96-461

SHERRYL S. GOFFER, PETITIONER

v.

TOGO D. WEST, JR., SECRETARY OF THE ARMY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT

OPINIONS BELOW

The decision of the court of appeals (Pet. App. 1a-2a) is unreported. The decisions of the district court (Pet. App. 3a-11a) are also unreported.

JURISDICTION

The judgment of the court of appeals was entered on June 24, 1996. The petition for a writ of certiorari was filed on September 23, 1996 (a Monday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In 1985 petitioner, a civilian employee of the United States Army, filed suit against the Secretary of the Army, alleging that she had been dismissed in retaliation for her equal employment opportunity

activities, in violation of Title VII of the 1964 Civil Rights Act, 42 U.S.C. 2000e *et seq.* Petitioner also sought review of a decision of the Merit Systems Protection Board affirming her dismissal.

The district court denied petitioner's request for immediate reinstatement (Pet. App. 7a-11a), and the parties engaged in discovery. A bench trial was conducted in September and December 1987, and the parties submitted proposed findings of fact and conclusions of law in March 1988. According to petitioner (Pet. 3), the district court indicated at the close of trial that it intended to hear closing arguments before rendering a decision.

As of May 1990, petitioner still had not received notice of any action by the district court. Her counsel then filed a request for a status conference, which was held on July 18, 1990. According to the docket entries,[1] the parties at that time requested closing arguments and the district court indicated that arguments would be scheduled. However, the court neither set a date for arguments nor responded to petitioner's later request, made in April 1991, for a decision in her case.

On February 9, 1993, petitioner filed a petition for a writ of mandamus with the court of appeals, requesting that the district court be directed to render a decision. Pet. 4. On April 8, 1993, the court of appeals denied the petition; the court, however, encouraged the district court to "attend resolution of this case as promptly as feasible" and indicated that it would entertain a renewed petition should the district court fail to follow that directive. Pet. App. 12a.

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[1] Petitioner has lodged a copy of the docket with the Clerk of the Court. Pet. 7 n.6.

2. While petitioner's mandamus petition was pending, the district court entered a "Memorandum and Order" in the case. Pet. App. 5a-6a. The court found in favor of the defendants on both claims, directed that "judgment [be] entered in favor of [the] defendant," and dismissed the complaint with prejudice. *Id.* at 6a. The opinion was filed and entered on the docket on February 23, 1993, and a copy was received by the U.S. Attorney's Office within a week of its entry on the docket. Pet. 7 n.6. Petitioner claims, however, that a copy of the decision was neither sent to, nor received by, her counsel.[2]

On June 5, 1995, petitioner's counsel obtained a copy of the docket in connection with preparing a second mandamus petition for the court of appeals. Upon learning of the February 23d Memorandum and Order, petitioner's counsel filed with the district court a motion for entry of judgment under Fed. R. Civ. P. 58. Pet. 8.

The district court denied the motion, holding that its February 23, 1993, decision complied with Rule 58 and had been properly entered on the docket, that notice of the entry had been sent to counsel, and that under Fed. R. Civ. P. 77(d) whether or not petitioner's counsel received the notice was irrelevant. Pet. App. 3a-4a.

3. The court of appeals summarily affirmed. Pet. App. 1a-2a. The court was "troubled" by the petitioner's "failure to learn of the entry of the order (through an examination of the district court docket)

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[2] Apparently, the court of appeals did not receive notice or a copy of the district court's decision, since its April 8 opinion makes no mention of it and is premised upon a conclusion that no decision had yet been rendered by the district court.

until June 1995." The court concluded that the district court's February 23, 1993, order "complied with the requirements of Fed. R. Civ. P. 58 and 79(a)." Pet. App. 1a.

ARGUMENT

We agree with petitioner that the decision below is in error and that relief in these circumstances is warranted.

1. At various points, petitioner complains of the fact that her counsel did not receive notice of the district court's February 23, 1993, decision. Pet. 5-8, 17-19 & n.9. Whether or not notice was received, however, is irrelevant. As petitioner eventually concedes (Pet. 17), Fed. R. Civ. P. 77(d) specifically states that the "[l]ack of notice of entry by the clerk does not affect the time to appeal or relieve or authorize the court to relieve a party for failure to appeal within the time allowed." Thus, the alleged lack of notice of the district court's decision cannot form a basis for relief in this matter.

2. We concede, however, that petitioner should be granted relief on another ground. Rule 58 of the Federal Rules of Civil Procedure requires that a judgment[3] be "set forth on a separate document," and it specifically states that a "judgment is effective *only* when so set forth" (emphasis added). The rule further provides that judgments must be entered in accordance with Fed. R. Civ. P. 79(a), which requires that all papers filed in an action be entered on the docket. The Court has held that these requirements "must be mechanically applied" to avoid "uncer-

[3] The term "judgment" as defined in Rule 54(a), "includes a decree and any order from which an appeal lies." Fed. R. Civ. P. 54(a).

taint[y] as to the date on which a judgment is entered." *United States* v. *Indrelunas*, 411 U.S. 216, 222 (1973). While the Court has also held that parties, through their actions, may waive these procedural mandates, *Bankers Trust Co.* v. *Mallis*, 435 U.S. 381 (1978), the Court has emphasized that these requirements "should be interpreted to prevent loss of the right of appeal, not to facilitate loss." *Id.* at 386 (quoting 9 J. Moore, *Moore's Federal Practice* ¶ 110.08[2], at 119-120 (1970)). Thus, because preservation of the right to appeal lies at the heart of the rule's mandate, the rule's requirements must be viewed as mandatory when a party would be unfairly prejudiced by anything short of strict compliance. Accord *Clough* v. *Rush*, 959 F.2d 182, 185 (10th Cir. 1992).

a. We do not believe that the February 23, 1993, decision satisfies the "separate document" requirement of Rule 58. As this Court explained in *Bankers Trust Co.*, 435 U.S. at 385, the purpose of this requirement was to eliminate any possible uncertainty that might arise when opinions or memoranda containing some of the elements of a judgment—but not formally labelled as such—were entered on the docket. Accordingly, "[t]he amended rule eliminates these uncertainties by requiring that there be a judgment set out on a separate document—distinct from any opinion or memorandum—which provides the basis for entry of judgment." *Ibid.* (quoting 28 U.S.C. App., at 7824).

As there is no "distinct" district court judgment in this matter that is separate from the court's memorandum, we agree that the court did not comply with the separate judgment requirement of Rule 58. Indeed, as petitioner notes (Pet. 15), numerous

appellate courts have held that documents containing the type of discussion included in the district court's decision in this case do not satisfy the separate judgment rule. See *Cooper* v. *Town of East Hampton*, 83 F.3d 31 (2d Cir. 1996); *Barber* v. *Whirlpool Corp.*, 34 F.3d 1268 (4th Cir. 1994); *Axel Johnson, Inc.* v. *Arthur Andersen & Co.*, 6 F.3d 78 (2d Cir. 1993); *Clough* v. *Rush*, 959 F.2d 182 (10th Cir. 1992); *Allah* v. *Superior Court*, 871 F.2d 887 (9th Cir. 1989); *Vernon* v. *Heckler*, 811 F.2d 1274 (9th Cir. 1987); *Kanematsu-Gosho, Ltd.* v. *M/T Messiniaki Aigli*, 805 F.2d 47 (2d Cir. 1986); *Paddock* v. *Morris*, 783 F.2d 844 (9th Cir. 1986); *Gregson & Assoc.* v. *Government of the Virgin Islands*, 675 F.2d 589 (3d Cir. 1982).

b. Further, the prejudice that has resulted from the failure to comply with Rule 58's requirements suggests that "mechanical application" of the rule is warranted in this case; the case relied on by the court of appeals is thus distinguishable. In *Spann* v. *Colonial Village, Inc.*, 899 F.2d 24 (D.C. Cir. 1990), plaintiffs' previous attempt to appeal had been rebuffed because the district court had failed to rule on all claims. The district court then endeavored to resolve the matter by ruling on the remaining claims, stating that its order "makes judgment in these cases final." *Id.* at 31. The court did not enter a separate judgment in accordance with Rule 58. Rejecting an argument that the appeal was premature, then-Judge Ginsburg stated for the court that "Rule 58 * * * 'must be applied in such a way as to favor the right to appeal,'" and that it "should not be used to require the pointless formality of returning to the district court for ministerial entry of judgment." 899 F.2d at 32 (quoting *Bankers Trust* v. *Mallis*, 435 U.S. at 384).

Clearly, the holding in *Spann*, like *Bankers Trust*, construed Rule 58 "to favor the right to appeal" and avoided the "pointless formality" of requiring an appellant to return to the district court for entry of a separate judgment meeting the requirements of Rule 58. 899 F.2d at 32 (quoting *In re Seiscom Delta, Inc.*, 857 F.2d 279, 283 (5th Cir. 1988)). That is entirely distinguishable from the present case, where the lower courts' construction of the February 23, 1993, "Memorandum and Order" resulted in the loss of petitioner's right to appeal.

3. This Court, of course, does not "mechanically accept any suggestion from the Solicitor General that a decision rendered in favor of the Government by a United States Court of Appeals was in error." *Lawrence* v. *Chater*, 116 S. Ct. 604, 606-608 (1996) (quoting *Mariscal* v. *United States*, 449 U.S. 405, 406 (1981)). However, in light of the change in position taken by the government, and the substantial authority supporting petitioner's contention (with which we now agree) that the court below erred in precluding her appeal, we respectfully suggest that the Court grant the petition, vacate the decision below, and remand the case to the court of appeals for further consideration. See generally, *e.g.*, *Lawrence* v. *Chater*, 116 S. Ct. at 606, 608; *Stutson* v. *United States*, 116 S. Ct. 600, 602 (1996).

CONCLUSION

The petition for a writ of certiorari should be granted, the order of the court of appeals granting summary affirmance and denying summary reversal should be vacated, and the case should be remanded for further consideration in light of the views expressed herein.

Respectfully submitted.

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* Acting Solicitor General Dellinger has recused himself from participation in this case.